IN THE

Supreme Court of the United States

OCTOBER TERM, 1943

No. 22

FRED TOYOSABURO KOREMATSU,
Appellant,

against

UNITED STATES OF AMERICA,
Appellee.

ON PETITION FOR WRIT OF CERTIORARI FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMERICAN CIVIL LIBERTIES UNION, AMICUS CURIAE

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

MORRIS M. GRUPP,
CLARENCE E. RUST,
of the California Bar,

EDWIN BORCHARD,
of the Connecticut Bar,

OSMOND K. FRAENKEL,
ARTHUR GARFIELD HAYS,
of the New York Bar,

HAROLD EVANS,
WILLIAM DRAPER LEWIS,
THOMAS RAEBURN WHITE,
of the Pennsylvania Bar,

of Counsel.

CASES CITED

Miscellaneous

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The American Civil Liberties Union joins with petitioner in asking this Court to review the judgment of the Circuit Court of Appeals for the Ninth Circuit, affirming petitioner's conviction, because the American Civil Liberties Union believes that it is important that this Court mark out precisely the boundaries of military power over civilians. The American Civil Liberties Union is particularly interested in this case because it presents problems of detention of citizens without judicial process, of discrimination on account of race and of summary action without hearing. By reason of its concern with these issues the Union had filed a brief amicus curiae with this Court in

the cases of *Hirabayashi* v. *United States* (320 U. S. 81) and *Yasui* v. *United States* (320 U. S. 115) when these were argued at the end of the October 1942 Term. However, this Court, in upholding the *Hirabayashi* conviction, did not pass upon the issue which to the Union seemed of the greatest importance in that case, namely, the validity of the order requiring all persons of Japanese ancestry, citizens and aliens alike, to depart from their homes on the west coast and be confined to camps. That issue is now clearly present in the case at bar.

The Circuit Court concluded that the reasons which formed the basis of the Court's decision in the *Hirabayashi* case sustained the validity of the evacuation order as well as the curfew restrictions. Judge Denman, while concurring that the questioned order was valid, disagreed from the conclusion of his colleagues that the issues had already been in effect disposed of by this Court. Sharing that view, we respectfully request the Court to grant a review in this case, so that it can expressly pass upon the important issues left open for determination in the *Hirabayashi* case.

There are three primary questions which concern the American Civil Liberties Union in its desire to protect all persons in their constitutional rights. Can citizens be detained by administrative order? Can evacuation and detention of citizens be justified simply on the ground that they are descended from persons whose fellow nationals are enemy aliens? Can evacuation and detention of citizens be carried out by military authority without any provision for inquiry whereby a particular individual can establish that he does not come within the general ground for the contemplated action?

POINT I

The military authorities have no power to order the detention of citizens.

We believe that this case presents the question of the power of the military to detain citizens against whom no charges have been preferred. We contend that no such power has been granted by Congress, or could constitutionally be granted.

The issue is presented because the evacuation orders, taken as a whole, made it quite plain that not evacuation only was required, but indefinite detention as well. That was conceded in the opinion of Judge Denman in the Circuit Court. And the facts permit of no other conclusion. On March 18, 1942 the President (Order 9102) established the War Relocation Authority to take charge of the "relocation, maintenance and supervision" of those about to be removed by the military authorities. On March 27, 1942 General deWitt issued Proclamation No. 4 (7 F. R. 2601), which forbade persons of Japanese ancestry from leaving the previously designated Military Area without express permission. This was followed by a series of exclusion orders, and the establishment of "Assembly Centers" and "Relocation Centers", to which all evacuees were sent. By the time the exclusion order here in question (No. 34) was promulgated (May 3, 1942), this practice had become uniform. Indeed the instructions which accompanied the order made it evident that the evacuees were to be transported to such centers. Moreover, no one was permitted to leave a center without express permission, and the only permission then contemplated was for limited periods of time (see Civilian Restrictive Order No. 1, May 19, 1942, 8 F. R. 982). That the evacuation and detention were part of a single integrated program is made clear in the recently published report by the War Department. This report, entitled "Japanese Evacuation from the West Coast,

1942", deals at length with the entire subject. Particularly pertinent in this connection are pages 44 ff., 78, 94, 237 ff. and the typical form of instructions printed at page 99.

We submit that Congress gave neither to the President nor to military authorities any power so far reaching, and that in the absence of legislation the President has no such power even in time of war. Public law No. 503 certainly is not capable of being construed as authority to detain citizens. And this Court's decision in the *Hirabayashi* case does not so hold; for it dealt only with curfew orders which were explicitly referred to at the time the law was under consideration. It is not enough to conclude that evacuation, which was also under contemplation, and was expressly referred to in the law, was authorized. For here there was not merely evacuation, but evacuation as a step toward detention.

Some attempt was made by the government, in the *Hirabayashi* case, to argue that the action taken was ratified by Congressional appropriation for the War Relocation Authority. But this appropriation was not voted until July 25, 1942 (56 Stat. 704). It could not ratify administrative orders made in May so as to make their violation then a crime. Petitioner was prosecuted by information filed June 12, 1942 for an offense alleged to have been committed in May. If the regulation he was charged with then violating was then not authorized by Congress no later ratification could make his disobedience in May a crime. That would be a violation of the prohibition against ex post facto laws (Art. I § 9). See *United States* v. *Stafoff*, 260 U. S. 477; *Viereck* v. *United States*, 318 U. S. 236.

We submit also that the war power of the President alone would not support such an order. This Court in effect so ruled in *Brown* v. *United States*, 8 Cranch. 110. That case dealt with a Presidential attempt to seize British owned property during the war of 1812. Chief Justice Marshall ruled that since Congress had given the President the right to detain enemy aliens but not the right to seize their property, his act was without support in the law. It

follows by like reasoning that since Congress has given the President power to detain enemy aliens (50 U. S. C. A. 21) but has not given the President similar power to detain citizens the order here under review cannot be sustained on the President's war power alone.

Writers on the subject have reached the same conclusion. Thus in Berdahl, War Powers of the Executive in the United States, it is nowhere suggested that these powers extend to the removal of citizens from one part of the United States to the other. It is only when martial law has been declared that executive authority may be exercised over citizens. Of course, there was no martial law in California. In Chapter 11 pages 183 and following, Mr. Berdahl discusses the President's power of police control and recognizes that such power over persons is derived only from Congressional authorization. The most that he concedes is that when Congress is not in session, the President may have power to act in an emergency (p. 192). Here Congress was continuously in session.

Finally, we submit that even the President and Congress, acting together, may not detain citizens of the United States against whom no charges have been preferred. The framers of the Constitution recognized the propensity of governments in times of crisis to take executive action rather than to pursue the ordinary course of the criminal law. The framers realized that in certain situations such conduct was necessary to the maintenance of government. For that reason the framers permitted the suspension of the writ of habeas corpus by which unlawful executive detention was normally challenged, but permitted such suspension only in time of invasion or insurrection. They did not permit the suspension merely because of the existence of a state of war, or even because of a fear of invasion. It was evidently contemplated that the detention permissible as the result of the suspension of the writ of habeas corpus should be possible only at a time of the direst immediate emergency, not at all as a precautionary measure. If, as we

think must be conceded, the situation in California in May 1942 would not have warranted the suspension of the writ of habeas corpus, then it must follow that any legislation seeking to circumvent the prohibition against the suspension of habeas corpus would be void. And any legislation directly authorizing the detention of citizens, except as the result of charges preferred under the criminal laws, would be an attempt to evade the prohibition against the suspension of the writ.

We do not believe that Congress intended to evade such suspension. That is one of the reasons why we do not think that the Act of March 21, 1942 can be construed as authorizing the detention of American citizens.

The questions raised are clearly important and far reaching. They have never heretofore been passed upon by this Court. Surely, review should be granted.

POINT II

The classification of citizens based solely on ancestry is a denial of due process and is forbidden by the Fifth Amendment.

We recognize, of course, that the Federal Government, unlike the states, is not subject to any express limitation in the selection of subjects or persons to be dealt with by government action; in other words, that the Constitution contains no equal protection clause affecting the Federal Government. Nevertheless, the due process clause of the Fifth Amendment does limit the power of the Federal Government in respect to classification. (See *Detroit Bank* v. *United States*, 317 U. S. 329, 337, and cases cited.) In the *Hirabayashi* case this Court recognized that classification on racial grounds is ordinarily arbitrary. But the Chief Justice concluded that the fact of racial ancestry was relevant so as to justify the imposition of a curfew order on citizens of Japanese origin only. But he was careful to point out that the Court did no more

than determine that the circumstances afforded a reasonable basis for the action taken in imposing a curfew:

> "We decide only that the curfew order, as applied, at the time it was applied, was within the boundaries of the war power."

And Mr. Justice Murphy, specially concurring, said that the decision then being rendered went "to the very brink of constitutional power."

We do not believe that the considerations which led this Court to uphold discrimination in the application of a curfew order are applicable to the order that is here in question. There are important differences in the character of the action taken and in the time when it was taken. The curfew order was imposed on March 24, 1942, to be effective within three days. It covered not only citizens of Japanese ancestry, but all enemy aliens, Japanese, German and Italian alike. It had an obvious immediate relation to the prevention of sabotage, and perhaps also to the possibility of invasion. It operated only as a minor restraint of liberty during the hours of darkness, when it was reasonable to suppose that attempts at sabotage would be most likely and assistance to a possible invader could most easily be given.

Altogether different are the various evacuation orders, one of which is here involved. These were issued over a considerable period of time, thus indicating the absence of any acute emergency calling for instant action. Indeed, the particular order here in question, Exclusion Order No. 34, was not issued until May 3, 1942, to become effective May 9, 1942. Consider, moreover, the character of this and similar orders. In the first place, they were directed only against persons of Japanese ancestry, not against enemy aliens of different origin. They were not limited to preventing the persons affected from entering military establishments, or even places which the military might consider necessary for defense purposes. Instead, they directed removal of all persons of Japanese ancestry from

their homes and places of business throughout the entire Pacific Coast area, for a depth in places of two hundred miles. (See opinion of Denman, J.) Moreover, these orders prevented persons affected from voluntarily leaving the areas and required them to submit to forced assembly in camps and to ultimate detention, at the pleasure of the military authorities.

We do not believe that the same circumstance of "ethnic affiliations with an invading enemy"—to quote a portion of the Chief Justice's opinion, which we cannot but feel was unfortunately phrased—can form the basis for the discrimination here practiced.

Whereas the curfew order was imposed on all enemy aliens, this order was restricted only to the Japanese. Whatever the justification for including citizens of Japanese ancestry as well as aliens within the scope of the curfew order, there can be no justification for providing for the wholesale evacuation from their homes and places of business of citizens of Japanese ancestry, while leaving even enemy aliens of German and Italian origin completely unaffected.

No considerations of relevancy can justify that result. Certainly, the action cannot be justified as a measure of protection against sabotage, for the danger of sabotage was a country-wide danger. It was in no way restricted to the Pacific Coast. And it was a danger even more to be feared from persons of German or Italian extraction, because of the greater likelihood of access on their part to places where sabotage might be fruitful. The very strangeness of appearance of persons of Japanese ancestry rendered the possibility of sabotage on their part less likely. Nor can fear of invasion be asserted as justification. It is true that at the time that the exclusion orders were first promulgated, the Japanese were proceeding without check in their conquest of the Philippines and the Dutch East Indies. Nevertheless, it must have been evident by the time the order in question was promulgated that no immediate invasion was possible. The Japanese had not

then invaded Australia; they had not even attacked Hawaii a second time. That the military authorities might have required all persons of Japanese ancestry to register and perhaps to report their continued whereabouts, so that appropriate action might be taken in case of possible invasion, is one thing. To assert that the mere possibility of invasion justifies what was done here is another. We do not believe that the necessity for a successful prosecution of the war, even the necessity for giving wide discretion to military authority, should permit such cruel and arbitrary interference with the freedom and livelihood of American citizens, as was here accomplished. Surely, the question is of such fundamental and far-reaching importance as to justify review by this Court.

POINT III

The exclusion order constituted a denial of due process because it made no provision for any hearing.

This point was also urged upon the Court in the *Hirabayashi* case. It was there rejected, insofar as the curfew order was concerned. The majority opinion contained no explicit discussion of this phase of the case. However, Mr. Justice Douglas, concurring, expressed the view that:

> "Where the peril is great and the time is short, temporary treatment on a group basis may be the only practicable expedient."

Again there is a difference between the scope and circumstances of the curfew order and those of the exclusion orders. The basis of the curfew order was obviously to minimize the possibility of harm which might result during the hours of darkness. It had but a limited effect on the liberties of the individuals restricted. It could be lifted when the emergency passed without the imposition of any serious harm on anyone. One's concept of fairness is not

shocked by the requirement that all persons in a certain group obey such an order, even though no opportunity is afforded to individuals to establish that because of their loyalty and devotion to this country, there was no reason for the government to fear harm should they be allowed to move about at night.

Quite different is the situation which resulted from the evacuation order. Under this and similar orders nearly one hundred thousand American-born men, women and children were torn from their accustomed ways of life and forced into concentration camps. Here is no temporary partial restraint of liberty, which, when lifted, has done no substantial harm. The harm done to these people is not only substantial, but in many cases irrevocable. Property rights have been lost, business connections destroyed. The intangible things which go to make a decent way of life have been broken. And all this without the establishment of any method whereby individuals whose lives always had been without blame or suspicion could establish their right to remain where they had always lived.

It is no answer to say that hearings would have taken time. There is no reason to suppose that hearings would have been more difficult to arrange for persons of Japanese ancestry than proved to be the case for enemy aliens, both German and Italian. It would not have been necessary for the military authorities to have provided for some form of hearing prior to the time when they believed it necessary to evacuate the affected persons. Surely, no consideration of military necessity could have stood in the way of arrangements for providing hearings to those affected immediately upon their reporting to the assembly centers designated in the various evacuation orders. Ultimately this was, of course, done, so that large numbers of those detained have been released. Our contention, however, is that no deprivation of liberty such as was here undertaken can be justified, unless some provision is at the time made for hearings. The absence of such provision renders the original order wholly void. It cannot be saved by the

creation of hearings machinery long afterward. Particularly is that so, since at the time when it is charged that petitioner violated the military order, namely, between May 9th and May 30th, 1942, no machinery of any kind existed under which hearings could be held. It was not until September 26, 1942 that regulations were issued with regard to granting leaves from the camps (7 F. R. 7656).

We urge this Court, therefore, to grant certiorari so that this important question of constitutional right can be adjudicated.

POINT IV

The constitutional issues can be raised in defense to a prosecution for refusing to obey the questioned order.

This Court has recently held, in *Falbo* v. *United States*, 221 U. S. , that a draftee could not set up the invalidity of a draft order in defense to a prosecution for refusing to appear for induction. We do not believe the case applies to the situation here presented. In the *Falbo* case there was no attack on the constitutionality of the draft law. Here the defense is predicated mainly on the unconstitutionality of all the actions which resulted in the challenged order. In the *Falbo* case this Court rested its decision largely on the fact that the administrative process was not complete with the induction order, since the army might reject a registrant after induction. Here no machinery existed for the relief of those ordered evacuated at the time the challenged order was issued. This circumstance makes inapplicable the comments of Mr. Justice Douglas in the *Hirabayashi* case (320 U. S. 81, 108) to the effect that a person affected by military order should submit to it and then take advantage of administrative regulations to be relieved of the duty of compliance. But in May, 1942, when petitioner was charged with violation of the order, there were no administrative regulations either for hearings or for release on any terms.

We call the Court's attention to *Arver* v. *United States*, 245 U. S. 365. There this Court considered at length various constitutional objections to the 1917 draft law which had been urged as defenses to a prosecution for refusing to appear for induction. It occurred to no one to suggest that these defenses could be raised only by submitting to induction. Surely it can make no difference that the attack there was on an Act of Congress, while here it is on a military order.

We submit, therefore, that petitioner's challenge to the constitutionality of the questioned order was proper in this case. Any other conclusion would be destructive of liberty.

CONCLUSION

Since important questions of constitutional right are presented in this case, questions not heretofore decided by this Court, certiorari should be granted.

Respectfully submitted,

AMERICAN CIVIL LIBERTIES UNION,
Amicus Curiae.

MORRIS M. GRUPP,
CLARENCE E. RUST,
of the California Bar,

EDWIN BORCHARD,
of the Connecticut Bar,

OSMOND K. FRAENKEL,
ARTHUR GARFIELD HAYS,
of the New York Bar,

HAROLD EVANS,
WILLIAM DRAPER LEWIS,
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of the Pennsylvania Bar,

of Counsel.